Public Prosecutor v Shafarin bin Zainal Abidin & Anor

HIGH COURT (SHAH ALAM)
KN SEGERA J
24 APRIL 2007

Criminal Law — Dangerous drugs — Trafficking — Whether accused knew the content of packages found in his car — Whether presumption of trafficking proved — Whether prosecution had established a prima facie case — Whether strong suspicion sufficient to call for defence — Dangerous Drugs Act 1952 ss 39B(1)(a)

Evidence — Presumption — Drug trafficking — Presumption of possession — No presumed possession or actual mens rea possession — Knowledge cannot be imputed — Whether sufficient to infer knowledge of the drugs

The first and second accused were charged separately under the Dangerous Drugs Act 1952 ('the said Act') for trafficking in drugs which is an offence under s 39B(1)(a) punishable under s 39B(2) of the said Act. The accused were prosecuted for having trafficked in the same packet of drugs weighing the same amount. However, the charges showed that the times of trafficking were not only different but one occurred at night whilst the other occurred in the day time. The prosecution did not attempt to amend the charge against the second accused from one of trafficking in the morning to one of trafficking at night so as to bring it in line with the charge against the first accused. There was also no evidence to support the charge against the second accused insofar as it related to the commission of the offence in the morning. All evidence related to events happening at night. There was no evidence that the second accused was involved in any way as he was picked up by the police solely because he had no valid documents on him. Furthermore, none of the prosecution witnesses could identify the second accused as the person who handed the package of drugs to the first accused. The prosecution sought to rely on s 37(d) of the said Act so as to invoke the presumption against the first accused that he had custody and control of the drugs in question because he had taken the drugs from a person who, according to the prosecution, was the second accused and had it put it under the driver's car seat.

Held, acquitting both the accused without calling for their defence:

(1) There was no credible evidence that the second accused was the person who handed over the package of drugs ('the said package') to the first accused (see para 16).

(2) There was no evidence that the first or second accused had possession of the drugs as no actual possession was proven. The attempt to use the presumption

under s 37(d) so as to show that the first accused had custody and control of the drugs failed because the words 'anything whatsoever containing any dangerous drug' did not refer to a vehicle, containing drugs, which was under the custody and control of a person (see para 17).

(3) In this case there was no evidence that both the accused had knowledge of the contents of the said package and there was also no actual mens rea possession. Knowledge cannot be imputed to the accused persons (see para 17).

(4) The burden on the prosecution to show a prima facie case is as heavy as proving a case beyond reasonable doubt. Suspicion even if strong cannot permit a court to call for the accused persons defence merely to get an assurance from the accused that they are not guilty (see paras 17–18).

[Bahasa Malaysia summary

Tertuduh pertama dan kedua dituduh secara berasingan di bawah Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar dadah yang merupakan kesalahan di bawah s 39B(1)(a) yang boleh dihukum di bawah s 39B(2) Akta tersebut. Tertuduh telah didakwa kerana mengedar bungkusan dadah yang sama beratnya. Bagaimanapun, pertuduhan menunjukkan bahawa kekerapan mengedar bukan sahaja berbeza tetapi satu berlaku di sebelah malam manakala satu lagi berlaku di siang hari. Pihak pendakwa tidak cuba meminda pertuduhan terhadap tertuduh kedua daripada satu kerana pengedaran sebelah pagi kepada satu kerana pengedaran di sebelah malam agar ia selaras dengan pertuduha tertuduh pertama. Tiada juga keterangan untuk menyokong pertuduhan terhadap tertuduh kedua setakat mana ia berkaitan berlakunya kesalahan tersebut di sebelah pagi. Semua keterangan berkaitan kejadian adalah pada sebelah malam. Tiada keterangan bahawa tertuduh kedua terlibat dalam apa cara sekalipun kerana beliau ditangkap oleh polis semata-mata kerana beliau tiada dokumen sah. Tambahan pula, tiada antara saksi pendakwaan dapat mengenalpasti tertuduh kedua sebagai orang yang menyerahkan bungkusan dadah itu kepada tertuduh pertama. Pihak pendakwaan memohon untuk bergantung kepada s 37(d) Akta untuk menggunakan andaian terhadap tertuduh pertama bahawa beliau mempunyai jagaaan dan kawalan dadah yang dipersoalkan kerana beliau telah mengambil dadah tersebut daripada seseorang yang, menurut pendakwaa, adalah tertuduh kedua dan telah meletakkannya di bawah tempat duduk penumpang kereta,.

Diputuskan, membenaskan kedua-dua tertuduh tanpa memanggil untuk pembelaan mereka:

(1) Tiada keterangan yang boleh dipercayai bahawa tertuduh kedua merupakan orang yang telah menyerahkan bungkusan dadah itu ('bungkusan dadah') kepada tertuduh pertama (lihat perenggan 16).

(2) Tiada keterangan bahawa tertuduh pertama atau kedua mempunyai milikan dadah tersebut kerana tiada milikan sebenar dibuktikan. Percubaan untuk menggunakan andaian di bawah s 37(d) yang menunjukkan bahawa tertuduh pertama mempunyai milikan dan jagaan dan kawalan dadah tersebut gagal

kerana perkataan-perkataan' anything whatsoever containing any dangerous drug' tidak merujuk kepada suatu kenderaan, mengandungi dadah, yang di bawah jagaan dan kawalan seseorang itu (lihat perenggan 17).

(3) Dalam kes ini tiada keterangan bahawa kedua-dua tertuduh mempunyai pengetahuan tentang kandungan bungkusan tersebut dan tiada milikan sebenar mens rea. Pengetahuan tidak boleh dikatakan dipunyai oleh yang tertuduh (lihat perenggan 17).

(4) Beban pihak pendakwaan untuk menunjukkan kes prima facie adalah sama beratnya membuktikan suatu kes melampaui keraguan munasabah. Rasa syak jika nyata tidak membenarkan mahkamah memanggil untuk pembelaan tertuduh hanya untuk mendapatkan jaminan daripada tertuduh bahawa mereka tidak bersalah (lihat perenggan 17–18).]

Notes

For cases on presumption of drug trafficking, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2034–2041.
For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 320–446.

Legislation referred to

Dangerous Drugs Act 1952 ss 39B(1)(a), (2)
Immigration Act 1959/63

Salim bin Soib (Md Azar Irwan bin Mohd Arifin with him) (Deputy Public Prosecutors, Attorney General's Chambers) for the prosecution.
Gurbachan Singh (Bachan & Kartar) for the first accused.
Azizul Shariman (Suzana Mokhtar with him) (Suzana Norlihan & Co) for the second accused.

KN Segara J:

[1] The charge against the first accused reads:

> Bahawa kamu pada 1 Julai 2002 jam lebih kurang 10 malam di hadapan stesyen minyak Caltex Jalan Besar Banting, Pandamaran, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya seberat 921g cannabis dan oleh yang demikian, kamu telah melakukan satu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[2] The charge against the second accused reads:

> Bahawa kamu pada 1 Julai 2002 jam lebih kurang 9.30 pagi di Jalan Uganda, Kampung Jawa, di dalam daerah Klang, di dalam Negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya seberat 921g cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah s 39B(2) Akta yang sama.

[3] The trial proceeded, with the prosecution calling nine witnesses to testify, in order to establish a prima facie case against each of the accused, as charged.

The prosecution aborted a trial within a trial, to determine the admissibility of an alleged oral statement made by the first accused soon after his arrest, as well as a written (caution) statement, upon instructions not to tender the caution statement. At no time did the prosecution seek to amend the word 'pagi' appearing in the charge against the second accused to read 'malam' before the commencement of the joint trial. The learned DPP having conduct of this case cannot be faulted for this because the consent, exh PI A, is in respect of an offence committed by the second accused at 'jam 9.30 pagi' and not 'jam 9.30 malam'.

[4] In issuing the consent (exh PI A) for such a serious charge, with a mandatory death sentence upon conviction, it would be unthinkable for the Public Prosecutor to have made a 'mistake', with regard to the time of the commission of the offence as well as the place where the offence was committed by the second accused, since he would have had access to the investigation papers. The Public Prosecutor would have scrutinized all the statements before issuing the written consent setting out the particulars of the offence, including date, time and place of the offence. There could not have been a typing error because it was not a question of typing am' or 'pm' into the charge, where a genuine error in typing an 'a' instead of a 'p' could have occurred. Here, the charge preferred was typed in Bahasa Malaysia. Therefore, the reference to 'pagi' instead of 'malam' in the charge against the second accused, was intentional. It cannot, by any stretch of imagination be attributed to a typing error, in the absence of any sworn testimony of the person responsible for such error. Any submission from the bar by the learned DPP, who did not issue the consent or frame the charge, of an alleged typing error, cannot prevail at the close of the prosecution's case when there is no evidence at all of any trafficking or possession of cannabis at the time ('jam 9.30 pagi') and place ('Jalan Uganda') stated in the charge, against the second accused.

[5] The evidence adduced by the prosecution shows, that upon information received, on 1 July 2002, at about 10pm, ASP Sarban Singh (SP3) led a team of police in four unmarked vehicles to the vicinity of a Caltex Petrol Station at 3½ mile Jalan Banting/Pandamaran, to look out for and detain motorcar Proton Wira BG'C 7464. The car was soon spotted coming from the direction of Banting to Pandamaran. Its path of travel was obstructed by SP3 and his team in front of the Caltex Petrol Station. All the four male Malay occupants of the car were arrested. None of the occupants attempted to run away or evade arrest, according to SP3. ['Semasa menahan kereta semua lelaki-lelaki itu ada didalam kereta. Semua lelaki-lelaki Melayu. Tidak ada sesiapa yang lari dari kereta itu. Kereta itu injinnya telah dimatikan'.]

[6] The four male Malay occupants of the car were identified as Aris Fadhillah, Shafarin, Omar Shaifuldin and Mohd Ridzuan. Aris Fadhillah (SP4) was seated at the driver's seat, Shafarin (first accused) was at the front passenger seat beside the driver, Omar Shaifuldin (SP7) was seated at the rear passenger seat behind the driver and Mohd Ridzuan (SP8) was seated at the rear passenger seat behind the front passenger (see exhibit P23). The second accused was neither a passenger in the car nor found anywhere near the vicinity of the petrol station where the car was detained by SP3, at about 10pm. The second accused was arrested on 2 July 2002, at about 12.30am

by L/Kpl Jumiat (SP9) at Jalan Uganda. It is more than 4 Km from where the four male Malays in the car BGC 7464 were arrested. SP9 testified, inter-alia:

> Sesampai di Jalan Uganda jam lebih kurang jam 12.30 pagi 2 Julai 2002 C/I Husni mendengar melalui walkie talkie yang diarahkan oleh ASP Sarban supaya menangkap lelaki yang berada di tepi Jalan Uganda tersebut
>
> Saya dan D/Khairul terus mendekati lelaki tersebut dan memperkenalkan diri 'Polis'. Dia cuba melarikan diri dan berlaku pergelutan untuk menangkap saspek tersebut. Saya dan D/Khairul berjaya menangkap lelaki tersebut.
>
> Saya ada membuat pemeriksaan badan lelaki tersebut dan tidak menjumpai apa-apa... Saya ada membuat laporan polis mengenai tangkapan tersebut....
>
> P24 (dicamkan) adalah laporan tersebut.
>
> Lelaki tersebut ditangkap kerana disyaki orang pendatang haram tanpa izin.
>
> Saya serahkan lelaki tersebut kepada ASP Sarban di Balai Polis Pandamaran.

[7] Under cross-examinaton by the second accused's counsel, SP9 testified:

> Saya setuju semasa ditangkap tidak ada paspot dijumpai pada badan OKT2.
>
> Setuju semasa OKT2 ditangkap tidak ada kunci motosikal dijumpai padanya.
>
> Setuju semasa OKT2 ditangkap tidak ada telefon bimbit didapati dari OKT2 sewaktu beliau ditangkap.

[8] Under cross-examination by the first accused's counsel SP9 testified:

> Setuju saya telah menangkap OKT2 atas arahan pegawai atasan saya iaitu ASP Sarban Singh Pada masa itu OKT2 hanya sedang berdiri ditepi Jalan Uganda.
>
> Setuju saya sendiri tidak nampak OKT2 melakukan apa-apa kesalahan. Arahan ASP Sarban hanya tangkap orang yang berdiri ditepi jalan. Itu sahaja. Pada masa itu hanya ada seorang berdiri ditepi jalan.
>
> Setuju ASP Sarban tidak memberitahu saya apakah kesalahan yang telah dilakukan oleh orang itu sewaktu memberi arahan kepada saya. Saya juga tidak syaki OKT2 melakukan apa-apa kesalahan.

[9] SP3 carried out an examination and search of the car he had detained. He found an aluminum foil package, wrapped in clear plastic, tied in red/white string, on the rear car floor behind the driver's seat (that is, at the foot of SP8). It was a very neat and innocuous looking parcel (see photograph P5A). It would have been impossible for anyone to know what was inside the parcel without tampering the packing (that is opening up the parcel). Although SP3 testified that he had made a small tear of the package to ascertain its contents, photograph P5A does not bear testimony to this. No close up photograph was taken to show the said tear and the resulting view from the tear. ['P5A (dicamkan) adalah gambar 1 ketulan mampat yang saya jumpai dalam kereta tersebut. P5A adalah gambar keadaan asal satu ketulan mampat tersebut. Selepas jumpa sahaja barang kes tersebut dalam kereta saya telah mengoyakkan satu penjuru bungkusan tersebut untuk mengesahkan kandungannya.

Dalam gambar PSA tidak dapat nampak bahagian yang saya koyakkan tersebut. Koyakkan tersebut kecil sahaja — lebih kurang 1 atau 1½ inch Tujuan saya mengoyakkan bungkusan itu ialah untuk mengesahkan kandungan. Saya nampak daun-daun kering yang dimampatkan — iaitu dalam bentuk mampat.']

[10] SP3 seized the package found in the car and then carried out a body search on all the four male Malays. He did not recover anything on their body incriminating them of any offence. ['Saya telah merampas ketulan ini dan menjalankan pemeriksaan badan keatas keempat-empat lelaki tersebut. Hasil pemeriksaan badan mereka tidak menjumpai apa-apa barang salah.']

[11] The testimony of the three the occupants of the motorcar (SP4, SP7, and SP8) has been clearly motivated by a desire to absolve themselves from the possibility of being charged, as well.

[12] SP8 testified that, on 1 July 2002, at about 6.30pm, he went to the house of one Wahab in Kg Raja Uda. There, he met Shafarin (first accused), Omar Shaifuldin (SP7) and Aris Fadhilah (SP4). Shafarin invited him to join them for a drive to Klang in his motorcar BGC 7646. Thereafter, he invited him to go to Kg Jawa. At Kg. Jawa they stopped at a Petronas Petrol Station. After filling up the fuel tank, Aris Fadhilah took over the driving of the car from Shafarin. They then proceeded in the car to Jalan Uganda. They arrived at Jalan Uganda at about 9pm. The car was then brought to a halt and parked beside the road. SP8 testified, that a person riding a motorcycle came along and gave a package to Shafarin, who placed it under his (Shafarin's) seat. SP8 was seated behind Shafarin. After placing the package under his seat, Shafarin did not do anything. They then proceeded in the car to Pandamaran.

[13] SP8 testified that when they arrived at Pandamaran they parked the car along the road, near a Caltex Petrol Station. Shafarin then took the package and gave it to Omar Shaifuldin, who asked him what was the package and Shafarin replied, 'Just leave it under the driver's seat.' {'Letak sahaja dibawah seat pemandu.']. SP8 testified that within two or three minutes, thereafter, the police arrived. SP8 said he could not identify the person who came on the motorcycle and handed the package to Shafarin as he only had a fleeting glance of his face. He testified as follows:

> Motosikal tersebut berhenti di sebelah tempat duduk Shafarin. Saya tidak pasti berapa jaraknya dari pintu Shafarin. Motosikal itu datang dari arah belakang.
>
> Orang itu menyerah barang dengan tangan sebelah kanan. Dia tidak memakai topi keledar. Semasa dia serah barang kepada Shafarin dia tidak bercakap. Shafarin pun tidak cakap kepada dia. Muka dia ada dipaling ke arah Shafarin. Saya nampak mukanya sekali imbas. Saya tidak boleh cam mukanya. Saya tak pernah nampaknya sebelum ini. Lelaki itu ambil barang itu dari bakul motosikal sebelum menyerahkan kepada Shafarin.

[14] Omar Shaifuldin (SP7) also could not identify the person who came on the motorcycle and handed over the package to Shafarin. He testified, inter alia:

> Semasa di Jalan Uganda lelaki menaiki motosikal datang dari belakang kereta sebelah kiri. Dia berhenti di pintu hadapan. Jaraknya di antara motosikal dan kereta setelah diberhenti ialah tiga kaki.

Saya ada lihat penunggang motosikal tetapi saya tidak boleh cam mukanya. Dia bagi bungkusan dan terus lalu. Dia tidak pakai topi keledar. Badannya kurus.

OKT1 tidak bercakap dengan lelaki menaiki motosikal itu semasa dia serah bungkusan kilat tersebut. Dia menghulurkan bungkusan ke dalam kereta. Saya lihat Shafarin menerima bungkusan tersebut. Dia ambil dan terus simpannya di bawah kerusinya.

Masa dari lelaki itu berhenti, menghulurkan bungkusan kilat dan OKT1 menyimpan di bawah kerusinya hanyalah lebih kurang lima saat. Saya tidak tahu ke mana lelaki itu pergi selepas menyerahkan bungkusan kilat tersebut.

[15] Aris Fadhillah (SP4), just like SP7 and SP8, only had a fleeting glance of the person who handed the package to the first accused. SP4 will not be able to identify him. SP testified under cross-examination:

Selepas saya ditangkap saya tidak pernah hadir mana-mana kawad cam pihak polis...

Setuju jika orang kelima yang ditangkap dan dibawa ke Balai Polis dan tunjuk kepada saya, saya tidak boleh cam beliau sebagai orang yang telah memberi bungkusan kepada OKT1 di Jalan Uganda sebab saya hanya melihat mukanya sekali imbas hari itu. Pada masa itu saya duduk di dalam kereta. Saya juga tidak keluar dari kereta untuk nampak muka beliau.

[16] There is not an iota of credible evidence to establish that the second accused, who was arrested on 2 July 2002, at 12.30am, was the same person who handed over the package to the first accused, on the night the car stopped at Jalan Uganda on 1 July 2002. The evidence of SP9, and his police report P24, shows the only legitimate ground for arresting the second accused was his lack of valid documents on his person, thus leading to a suspicion that he had committed an offence under the Immigration Act 1959/63. There appears to be absolutely no legal basis at all for ASP Sarban to have directed SP9 to arrest the second accused on 2 July 2002, at 12.30am, for any drug offence.

[17] The evidence adduced by the prosecution in this joint trial speaks for itself. There is no evidence at all that either the first accused or the second accused had possession of the package (containing 921g of cannabis, upon analysis by the chemist, SP2) found in the car by the police at 10pm on 1 July 2002. The burden on the prosecution to prove a prima facie case is equally as heavy as it is to prove a case beyond reasonable doubt. No inference of knowledge of the contents of the parcel can be imputed, to the first accused merely on the ground he had handled the parcel, before passing it over to SP8, to place it under the driver's seat.

[18] Suspicion, however strong against an accused that he could have committed the offence, is insufficient to warrant the calling for the defence in order to seek an assurance from him that the suspicion is baseless, and he is in fact not guilty of the offence.

[19] The first accused and the second accused are acquitted and discharged as the prosecution has failed to establish a prima facie case in respect of each of the charges.

Both accused acquitted without calling for their defence.

Reported by Daphne Sebastian